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No. 94-1843

In The

Supreme Court of the United States

October Term, 1994

EDGERTON SAND & GRAVEL, INC.,

Plaintiff-Respondent-Petitioner,

vs.

GENERAL CASUALTY COMPANY OF WISCONSIN and AETNA CASUALTY AND SURETY COMPANY,

Defendants-Appellants-Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Supreme Court has jurisdiction to grant a petition for writ of certiorari when the state supreme court decision is based on independent and adequate state grounds.

2. Whether a Wisconsin Supreme Court Justice should be disqualified from participating in a case even though there is no conflict under Wisconsin Statute § 757.19(2) and the party raising the conflict waived any objection it may have had to the justice's participation under Wisconsin Statute § 757.19(3).

STATEMENT PURSUANT TO RULE 29.1

Respondent, General Casualty Company of Wisconsin, is a corporation organized under the laws of the State of Wisconsin and is owned by Winterthur U.S. Holdings. Winterthur U.S. Holdings is a Delaware corporation wholly owned by Winterthur Swiss Insurance Company, a Swiss Company.

Respondent, Aetna Casualty & Surety Company, is a wholly owned subsidiary of Aetna Life & Casualty Company.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, General Casualty Company of Wisconsin ("General Casualty") and Aetna Casualty & Surety Company ("Aetna"), respectfully request this Court deny the petition for writ of certiorari seeking review of the Wisconsin Supreme Court's decision denying Edgerton Sand & Gravel, Inc.'s ("ES&G") Motion To Vacate Decision Or Alternatively To Rehear The Case Without The Participation Of Challenged Justice.

STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. § 1257(a), this Court is without jurisdiction to entertain this petition because the Wisconsin Supreme Court decision is based on independent and adequate state grounds and there is no federal issue to be decided.

STATUTORY PROVISIONS INVOLVED

Wisconsin Statute § 757.19 provides, in part:

> (2) Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:
>
> > (a) When a judge is related to any party or counsel thereto or their spouses within the 3rd degree of kinship.
> >
> > * * *
> >
> > (f) When a judge has a significant financial or personal interest in the outcome of the matter. Such interest does not occur solely by the judge being a member of a political or taxing body that is a party.
> >
> > * * *
>
> (3) Any disqualification that may occur under sub. (2) may be waived by agreement of all parties and the judge after full and

complete disclosure on the record of the factors creating such disqualification.

STATEMENT OF THE CASE

The decision which ES&G seeks to vacate involves an issue concerning insurance coverage for environmental claims. The parties — ES&G, the City of Edgerton (the "City"), General Casualty and Aetna — sought the state court's interpretation of a variety of insurance policy provisions including the policy terms "suit" and "damages." In 1992, the Wisconsin Court of Appeals ruled in favor of ES&G and the City on these issues and on June 16, 1994 the Wisconsin Supreme Court reversed, granting summary judgment in favor of the insurers. Both ES&G and the City petitioned this Court for writ of certiorari on the issue of "damages."[1] The petition was denied on March 20, 1995.

For all practical purposes, the case is now over. ES&G and the City have exhausted all legitimate avenues to contest the Wisconsin Supreme Court decision.

In a last ditch effort to contest the decision, ES&G, by its sole shareholder, Attorney Charles V. Sweeney, moved the Wisconsin Supreme Court to vacate its decision and disqualify a member of the court. In its motion, ES&G claimed one of the four justices in the majority had a conflict of interest rendering the June 16, 1994 decision void. There was no conflict of interest. ES&G's motion was nothing more than an unwarranted attack on a Wisconsin Supreme Court Justice in an improper attempt to obtain a different result. This unwarranted attack continues.

A chronology of the events exposes the true motives behind

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1. ES&G's claim that it petitioned this Court for writ of certiorari on the issue of "suit" as well is simply wrong. (Pet. at 8).

ES&G's motion. At the commencement of oral argument on November 29, 1993, Justice Geske stated:

> I also want to make a disclosure. Last night, when I was looking one more time at the amicus briefs, I noted that Mr. Burrell had filed an amicus brief on behalf of the Insurance Environmental Litigation Association, and I looked at the appendix and I noted that one of the companies listed in that is St. Paul Companies. My husband is employed by that company. I do not believe that presents any conflict and will not influence me. If anybody has any objections to me sitting on this case, I would appreciate hearing from you in letter by the end of the week. Thank you.

(Pet. App. 105-06).

No one objected to Justice Geske's participation in the decision. For months, the Wisconsin Supreme Court carefully analyzed the facts and law. Throughout the entire process, no one raised any question concerning Justice Geske's impartiality. After the Wisconsin Supreme Court rendered its June 16, 1994 decision, the plaintiffs, together with 100 plus proposed *amici curiae*, filed motion after motion in a choreographed attempt to convince the Wisconsin Supreme Court its decision should be withdrawn. There was a motion for reconsideration, a motion to supplement the record, motions for leave to file *amicus curiae* briefs, and a motion for leave to file a reply brief. None of the motions questioned Justice Geske's ability to impartially hear the case. Twelve proposed *amici curiae briefs* were filed. None of the proposed briefs questioned Justice Geske's fairness or impartiality.

On September 2, 1994, three proposed *amici curiae* filed an *amici* motion to vacate the court's decision or alternatively to request Justice Geske disqualify herself (hereinafter referred to as the "K.A.T. Realty motion").[2] Neither ES&G, the City nor the other 100 plus entities filing *amici curiae* motions joined in this motion.

Had there been any real concern about Justice Geske's impartiality, both ES&G and the City would have objected to her participation before the case was decided. They did not. Nor did they join in the almost identical K.A.T. Realty motion. Instead, they waited for the Wisconsin Supreme Court's decision on their motion for reconsideration.

On October 25, 1994, the Wisconsin Supreme Court denied ES&G and the City's motion for reconsideration. One month later (and over a year after the disclosure at oral argument, five months after the June 16 decision was rendered, and almost three months after the K.A.T. Realty motion was filed) ES&G — alone — filed a motion to vacate the court's decision claiming Justice Geske was disqualified from hearing the case under Wisconsin Statute § 757.19 and due process grounds. Neither the City, counsel representing both the City and ES&G throughout the entire litigation, nor Attorney Sweeney's own law firm supported the motion.

In an attempt to allege a conflict, the motion papers filed by ES&G in the Wisconsin Supreme Court were replete with what could, at best, be described as misstatements, and unsupported allegations and conclusions. In its February 23, 1995 decision on the motion, the Wisconsin Supreme Court repeatedly criticized ES&G for its "persistent and unfounded" assertions, many of which ES&G continues to make here. (Pet. App. at 109).

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2. The motion for leave to file an *amici* motion was denied by the Wisconsin Supreme Court on September 15, 1994.

A unanimous Wisconsin Supreme Court (without the participation of Justice Geske) denied ES&G's motion finding it meritless.[3] The decision was based solely on the Wisconsin disqualification statute. The court determined, pursuant to Wisconsin Statute § 757.19(2), there was no conflict of interest and Justice Geske had acted in an impartial and just manner. (Pet. App. at 112). The court also determined, pursuant to Wisconsin Statute § 757.19(3), ES&G had on multiple occasions, waived whatever objections it may have had to Justice Geske's participation in the court's decision. (Pet. App. at 102, 104-05, 106, 108). ES&G now petitions for writ of certiorari seeking a review of the Wisconsin Supreme Court's decision dismissing its motion to vacate the June 16, 1994 decision and disqualify Justice Geske.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction to grant this petition. The Wisconsin Supreme Court's decision was based on independent and adequate state grounds and this case fails to present a substantial federal question. This Court has consistently observed the long standing rule that it cannot review a judgment of a state court that rests on independent and adequate state grounds.

Even if this Court had jurisdiction, this case involves the interpretation of Wisconsin's disqualification statute. Federal courts are bound by state courts' interpretation and application of their own state statutes. Review of a state supreme court's

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3. In addition, the Wisconsin Judicial Commission, the body charged with investigating Wisconsin ethics complaints, investigated an anonymous complaint lodged against Justice Geske alleging her participation in the case constituted a violation of the Wisconsin Code of Judicial Ethics. After a thorough investigation, the Commission determined there was no probable cause to believe any violation had occurred. (Pet. App. at 113-14).

decision interpreting its own state statute is far removed from the role of this Court.

In an attempt to create a federal issue, ES&G claims its due process rights have been violated. However, as this Court and others have held, where there is a disqualification statute, it is unnecessary to address the due process issue because the failure to demonstrate disqualification under the statute, *a fortiori*, defeats a due process challenge.

Finally, even if the jurisdictional defect could be ignored and ES&G could somehow transform this state issue into a federal one, the petition still does not merit review. The first issue presented by ES&G concerning the *amicus curiae* is totally irrelevant to any due process analysis and assumes — incorrectly — facts not present in this case. Contrary to ES&G's assertions, St. Paul was **not** an *amicus curiae* in the case and Justice Geske did **not** have a direct, personal, substantial and pecuniary interest.

Because there are no grounds for disqualification in the first instance, ES&G's second issue concerning the appropriate waiver standard is inapplicable. Moreover, this Court lacks jurisdiction to address the waiver issue because it was not raised in the Wisconsin Supreme Court. Finally, regardless of the standard employed, there is no doubt ES&G voluntarily, knowingly and intelligently waived any objection it may have had to Justice Geske's participation in the decision.

REASONS FOR DENYING THE WRIT

I.

THE WISCONSIN SUPREME COURT DECISION WAS BASED ON INDEPENDENT AND ADEQUATE STATE GROUNDS AND THIS COURT LACKS JURISDICTION TO GRANT THE PETITION.

ES&G claims this Court has jurisdiction under 28 U.S.C. § 1257(a).[4] However, this Court has repeatedly held it lacks jurisdiction over a state case which fails to present a substantial federal question.

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

Lynch v. People of New York, 293 U.S. 52, 54 (1934), *reargument denied*, 266 N.Y. 431, 195 N.E. 141 (1934) (*see also*, cases cited therein).

When the judgment rests on state grounds, the Supreme Court has no jurisdiction to review the case. As the Court stated in

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4. Despite the requirements of Supreme Court Rule 14(h), ES&G fails to provide any explanation supporting its claim of proper jurisdiction.

Herb v. Pitcairn, 324 U.S. 117, 128 (1945), "[i]t is our purpose scrupulously to observe the long standing rule that we will not review a judgment of a state court that rests on an adequate and independent ground in state law." *See also Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983) (when it is clear from the opinion the state court's decision was based on independent and adequate state grounds, the Court lacks jurisdiction); *Roundhouse Construction Corp. v. Telesco Masons Supplies Co.*, 429 U.S. 889 (1976) (writ denied because judgment below rested on adequate state grounds); *Fox Film Corp. v. Muller,* 296 U.S. 207, 209-10 (1935); Justice Brennan, *State Constitutions and the Protection of Individual Rights,* 90 Harv. L. Rev. 489, 501 (1977) (such "state decisions not only cannot be overturned by, they indeed are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such state decisions.").

In instances where both federal and state issues are presented to the state court and the state court chooses only to address the independent state issue, the Supreme Court lacks jurisdiction to review the case. *Fox Film Corp. v. Muller* is instructive.

In *Fox Film Corp.,* the litigants raised a state contract issue and a federal Sherman anti-trust issue. The Minnesota Supreme Court decided the state issue without deciding the federal issue. In finding that it lacked jurisdiction to hear the case, the Court stated:

> [T]he primary question to be determined by the court below was whether the concededly invalid clause was separable from the other provisions of the contract. The ruling of the state Supreme Court that it was not, is sufficient to conclude the case without regard to the determination, if, in fact, any was made, in respect of the federal question. It follows

> that the nonfederal ground is adequate to sustain the judgment.

Fox Film Corp., 296 U.S. at 210.

The same rationale applies here. In this case, the Wisconsin Supreme Court was presented with two issues: Whether Wisconsin Statute § 757.19 operated to disqualify Justice Geske and whether ES&G had received due process. Despite ES&G's feeble assertion in footnote 4 of its brief that the court "necessarily determined the federal question," there is no doubt the Wisconsin Supreme Court decided the case solely on the state issue. The Wisconsin Supreme Court cited only to Wisconsin state statutes and Wisconsin case law.[5] The Wisconsin Supreme Court never discussed, let alone decided, the federal issue. Nor was it necessary for the court to do so.

In *Aetna Life Insurance Company v. Lavoie*, cited by ES&G, this Court stated:

> [N]ot "[a]ll questions of judicial qualification . . . involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, *would seem generally to be matters merely of legislative discretion.*

475 U.S. 813, 820 (1986) (emphasis added). The Court, recognizing the trend was towards the adoption of statutes that permit disqualification for bias or prejudice, further stated:

> The Due Process Clause demarks only the outer boundaries of judicial disqualification.

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5. The only time the court referred to any federal authority is when it distinguished the authority cited by ES&G. (Pet. App. at 110 n.4).

> *Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here.*

Id. at 820, 828 (emphasis added).[6]

Following *Lavoie*, courts have frequently held that where the legislature has adopted a statutory disqualification standard more demanding than that required by the due process clause, the case may be decided on the statute alone. *See, e.g., In re International Business Machines Corp.*, 618 F.2d 923, 932 n.11 (2nd Cir. 1980) (declining to address due process issue finding disqualification statute more stringent and that "anything impinging on the constitutional right would have more readily violated § 144 and § 455"); *United States v. Haldeman*, 559 F.2d 31, 130 n. 276 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1976), *rehearing denied*, 433 U.S. 916 (1977) (same); *City of Cleveland v. Cleveland Electric Illuminating Co.*, 503 F. Supp. 368, 382 (N.D. Ohio 1980) (failure to meet disqualification statute "*a fortiori*" defeats the due process allegation); *United States v. Conforte*, 457 F. Supp. 641, 659 n. 13 (D. Nev. 1978), *aff'd*, 624 F.2d 869 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (1980) (defendant's constitutional claim summarily rejected in light of its failure to demonstrate disqualification under the statute since bias or prejudice would more readily violate the statute rather than due process).

Like the federal statute, Wisconsin Statute § 757.19 provides a more demanding standard than the due process clause requires.[7]

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6. At the time *Lavoie* was decided, Alabama did not have a disqualification statute addressing the issue. *See* Alabama Statute §12-1-12.

7. Disqualification under Wisconsin Statute § 757.19(2) may occur (Cont'd)

As a result, the Wisconsin Supreme Court's application of the state statute alone was "sufficient to conclude the case without regard to the determination . . . of the federal question." *Fox Film Corp.*, 296 U.S. at 210.

The Wisconsin Supreme Court decision was based on independent and adequate state grounds and there is no federal issue to be decided. Accordingly, this Court lacks jurisdiction to grant the petition.

II.

THE DUE PROCESS ISSUES PRESENTED BY ES&G DO NOT WARRANT SUPREME COURT REVIEW.

ES&G's motion involves the interpretation of a Wisconsin state statute.[8] It is well established federal courts are bound by state courts' interpretation and application of their own state statutes. *See, e.g., L.S. Heath & Son, Inc. v. AT&T Info. Sys. Inc.*, 9 F.3d 561, 574 (7th Cir. 1993); *In re Schlein*, 8 F.3d 745, 754 (11th Cir. 1993); *Johnson v. Fleet Finance, Inc.*, 4 F.3d 946, 947 (11th Cir. 1993); *Kifer v. Liberty Mut. Ins. Co.*, 777 F. 2d 1325, 1329 (8th Cir. 1985). However, even assuming, *arguendo*, this Court could review ES&G's constitutional challenge (despite the

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(Cont'd)
when the judge has a significant financial interest in the outcome of the case. Whereas disqualification under the due process clause, which only occurs in the "most extreme of cases," requires a showing that the judge has such a "direct, personal, significant and pecuniary" interest in the outcome of the case. *See Lavoie*, 475 U.S. at 821-22.

8. Even in its brief, ES&G argues there was a violation of Wisconsin Statute § 757.19 (Pet. at 6) and argues Justice Geske failed to meet the standards set forth in Wisconsin Statute § 757.19 (Pet. at 5-6).

jurisdictional defect and the fact that state law controls), this petition should still be denied because the due process issues raised by ES&G, in and of themselves, do not merit Supreme Court review.

Supreme Court Rule 10 specifies the character of reasons that are considered appropriate for the Supreme Court's discretionary review. None of them are applicable here. ES&G apparently agrees since, unlike its first petition for writ of certiorari, it does not even cite to Supreme Court Rule 10 or attempt to explain how the issues fall within the parameters of the rule.

A. The First Issue Presented By ES&G Is Not Relevant To Any Due Process Analysis And Is Not Supported By The Facts Of This Case.

The first issue presented by ES&G is whether the due process clause requires the recusal of a judge when the judge has a substantial pecuniary and personal interest in an *amicus curiae*.[9] This issue does not merit review for two reasons. First, the issue is irrelevant under the due process analysis employed by this Court because it does not matter *why* a judge may have an interest in the case; the issue is whether the judge *has* an interest in the outcome of the case. Second, ES&G misstates the facts underlying this issue.

The Supreme Court limits its review to special and important issues that have a far reaching impact. Supreme Court Rule 10.

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9. It should be noted that throughout its moving papers in the Wisconsin Supreme Court, ES&G complained "Justice Geske had a significant financial and personal interest in the *outcome of this appeal*." (emphasis added). At no time prior to this petition did ES&G distinguish between a judge's alleged interest in the outcome of the case and a judge's alleged interest in a particular item that caused the interest.

Here, the issue presented is irrelevant to the due process analysis employed by this Court. In analyzing whether due process requires disqualification, this Court has stated:

> [A] reasonable formulation of the issue is whether the "situation is one 'which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.' "

Lavoie, 475 U.S. at 822 (*quoting Ward v. Village of Monroeville,* 409 U.S. 57, 60 (1972)). The Court further stated, due process considerations only arise when a judge has a "direct, personal, substantial, [and] pecuniary" interest in the outcome of the case. *Id.* at 824. Such an interest, the Court suggested, would only occur in the "most extreme of cases." *Id.* at 821.

Following the standard employed by this Court, it does not matter whether the interest is in a party, an *amicus curiae* or arises for some other reason. The inquiry is not what causes the interest but whether there is such a "direct, personal, substantial [and] pecuniary" interest which would "offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." Thus, it is irrelevant as to *why* the interest may occur; this Court's analysis only focuses on whether there is (for whatever reason) an interest in the outcome of the case.

More important, this issue is not even properly before the Court because the facts underlying the issue are not present in this case. First, St. Paul was **not** an *amicus curiae* in the case. Second, Justice Geske did **not** have a direct, personal, substantial and pecuniary interest in either St. Paul or the outcome of the case.

Throughout its brief, ES&G blatantly exaggerates St. Paul's

role in this appeal.[10] St. Paul is not a party to this action. St. Paul is not even an *amicus curiae* as ES&G misrepresents. It is simply one of the many members of an organization that filed an *amicus* brief.

In addition, the accusation that Justice Geske had a direct, personal, substantial and pecuniary interest in this case is entirely devoid of any merit. ES&G's sole basis for accusing Justice Geske of having such an interest is, as ES&G claims, "her ownership of more than $50,000.00 in St. Paul stock and other securities in the St. Paul savings plan, her interest in the St. Paul retirement plan . . ." and her spouse's employment as a staff attorney at St. Paul. (Pet. at 13-14). ES&G mischaracterizes Justice Geske's "interest" in St. Paul and completely fails to explain how this alleged "interest" or her spouse's employment would create such a direct, personal, substantial, and pecuniary interest so as to make this one of the "most extreme of cases."

The St. Paul "interest" in question was disclosed by Justice Geske on her Wisconsin Ethics Board Disclosure form. As part of her disclosure, she listed the securities either she or her spouse own as including, among others, "Savings Plus Program from St. Paul Fire & Marine-St. Paul stocks and mutual funds." There is no evidence Justice Geske owned "more than $50,000" in St. Paul holdings since the "stocks and other securities" referred to by ES&G are really St. Paul stock *and* mutual funds.[11]

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10. ES&G has already been chastised by the Wisconsin Supreme Court for mischaracterizing St. Paul's role. (Pet. App. at 109) ("it must be noted that all of ES&G's arguments for disqualification hinge upon its persistent and unfounded assertion that St. Paul Companies is in essence a party to the action. It is not.").

11. Also contrary to ES&G's assertions, the entire investment appears to be part of a retirement plan. Many employers offer similar plans to their employees.

St. Paul's mutual funds are operated by the John Nuveen Company ("Nuveen"). Nuveen "specializes in the management of tax-free investments (*i.e.* bonds) for individual investors, and in the underwriting of municipal securities to institutional investors." (Best's Insurance Reports at 3038). There is no evidence Nuveen holds any St. Paul stock in any mutual fund in which Justice Geske may be invested. In short, there has been no showing that Justice Geske had any significant financial interest in St. Paul in the first place.

Moreover, there has been no showing that the outcome of the *City of Edgerton v. General Casualty Co. of Wisconsin* decision has had any effect whatsoever on the price of St. Paul stock.[12] The publicly traded company is "The St. Paul Companies, Inc." It is a diverse management holding company traded on the New York Stock Exchange and primarily engaged in property and casualty insurance, insurance brokerage, and the investment/banking asset management business. (Best's Insurance Reports at 3039). Only a small amount of St. Paul's net premiums and operating profits are generated through the type of policy at issue here. The Commercial Multiperil Line (which includes more than just the CGL policies) comprises less than 17.9% of the premiums written by St. Paul Insurance Group.[13] (Best's Insurance Reports at 3039). Of that 17.9%, less than 4.5% is written in Wisconsin. (1992 Wisconsin Insurance Commisioner's Report, hereinafter referred to as "Commissioner's Report"). In addition, St. Paul's business accounts for only 1.5% of all premiums written by carriers in Wisconsin with its medical malpractice line

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12. Notably, the day following the June 16, 1994 decision, the price of St. Paul's stock went down.

13. The St. Paul Insurance Group consists of 17 domestic property and casualty subsidiaries that underwrite medical malpractice, commercial lines, personal lines and reinsurance. (Best's Insurance Reports at 3038). They are wholly owned by the St. Paul Companies, Inc.

representing the largest percentage of St. Paul's overall net premiums and operating profits. (Commissioner's Report at 127; Best's Insurance Reports at 3039).

Contrary to ES&G's reckless assertions, an honest evaluation of Justice Geske's St. Paul "interest," together with the nature of St. Paul's involvement in this case and the structure of its business, demonstrates Justice Geske did not have a direct, personal, substantial and pecuniary interest in St. Paul. *See Department of Energy v. Brimmer,* 673 F.2d 1287, 1295 (Temp. Emer. Ct. App. 1982) (judge who owned stock in certain companies that participated in the Entitlement Program but did not own stock in any of the parties did not have a direct or personal financial interest and could hear the case without contravening due process).

Nor did Justice Geske have a direct, personal, substantial and pecuniary interest in this case as a result of her spouse's employment. At oral argument before the Wisconsin Supreme Court, Justice Geske disclosed her spouse, Michael J. Hogan, was an employee of St. Paul. Without support, ES&G claims Justice Geske had a direct, personal, substantial and pecuniary interest because her spouse is a "staff attorney" for St. Paul. There is nothing to indicate Justice Geske's spouse's employment would have been jeopardized if the case had been decided differently. Nor is there any evidence that her spouse's employment benefited from this decision. In light of the 100 or more reported cases in which St. Paul has actually been a party (as discussed in footnote 8 of ES&G's petition), it is highly unlikely any one case would have any impact on a St. Paul employee.

ES&G further alleges Justice Geske had a direct, personal, substantial and pecuniary interest by virtue of her spouse's employment because her spouse "represents St. Paul in insurance coverage litigation that determines whether St. Paul is liable for

defense and indemnification costs incurred by its insureds." (Pet. at 6). First, there is no evidence suggesting Justice Geske's spouse litigates insurance coverage issues. (ES&G's only authority on this point is its own brief filed in the Wisconsin Supreme Court which makes the same unsupported assertions). Second, even if there was evidence to support this contention, ES&G fails to explain why it is in any way relevant.

ES&G cannot simply rest upon a variety of unsupported allegations in an attempt to show a direct, personal, substantial and pecuniary interest. As *Lavoie* indicated, any interest must be real, direct and substantial. There is no evidence even remotely establishing such an interest in this case and ES&G's claim is utterly baseless. Because the facts underlying the issue are not present in this case and the issue itself is totally irrelevant to any due process analysis, certiorari is not warranted.

B. The "Voluntary, Knowing And Intelligent" Waiver Issue Was Not Raised In The Wisconsin Supreme Court And Otherwise Does Not Merit Review.

It is fundamental that ES&G's waiver issue does not even arise unless there are grounds for disqualification. Since there was no reason for disqualification in the first instance, there is no need for the Court to address the waiver issue.

Moreover, in its petition, ES&G, for the first time, raises the issue concerning whether there must be a "voluntary, knowing, and intelligent" waiver in disqualification cases. This issue was never presented to nor considered by the Wisconsin Supreme Court. Throughout its moving papers in the Wisconsin Supreme Court, ES&G argued "Justice Geske failed to fully and completely disclose her interest, and thereby failed to obtain a waiver for mandatory disqualification under Wisconsin Statute

§ 757.19(3)."[14] At no time prior to this petition has ES&G argued that the standard for waiver in this case is a "voluntary, knowing and intelligent" one. This Court has frequently held it is without jurisdiction when the issue had not been raised below. *See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) ("[i]t was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of a state court decision"); *Doe v. Delaware*, 450 U.S. 382, 382 (1981), *reh'g denied*, 451 U.S. 964 (1981), *reh'g denied*, 458 U.S. 1117 (1982) ("appeal dismissed for want of a properly presented federal question"). Thus, this Court lacks jurisdiction to address this issue.

Even if this Court did have jurisdiction to grant certiorari on this issue, certiorari is not warranted. It simply does not matter which test should be utilized in this case since, even under the most stringent test advocated by ES&G, there is no doubt ES&G waived whatever objections it may have had to Justice Geske's participation in this case. ES&G now claims it did not voluntarily, knowingly or intelligently waive its rights because Justice Geske did not disclose: (1) her spouse was an attorney at St. Paul (she disclosed her spouse was employed by St. Paul); and (2) her spouse participated in the St. Paul Savings Plus program. Whether her spouse is an attorney, claims manager or a sales representative at St. Paul is irrelevant.[15]

Moreover, it is common knowledge many companies offer profit sharing plans which include their own stock. ES&G's apparent assumption that Justice Geske's spouse did not have

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14. Ironically, despite its contention that this case involves issues of due process, ES&G continues to make that same claim here. (Pet. at 5-7).

15. Nowhere in its petition did ES&G state that counsel representing ES&G did not know Mr. Hogan was employed by St. Paul as an attorney. It is well known in the Wisconsin legal community that Justice Geske's spouse is an attorney.

such a plan at such a large corporation as part and parcel of his employment reflects its stunning naivete about the workings of American corporations. Justice Geske's disclosure concerning her husband's status as an employee of a major corporation should have conveyed to the parties, including ES&G (who was represented by counsel and whose sole shareholder is an attorney) that Mr. Hogan received fringe benefits including a pension and profit sharing plan. ES&G can hardly contend it did not voluntarily, knowingly and intelligently waive any objection it may have had to Justice Geske's participation when it failed to raise the issue within one week of oral argument. *See Erie Telecommunications, Inc. v. City of Erie,* 853 F.2d 1084, 1096 (3rd Cir. 1988) (in analyzing this issue. the court should look to the sophistication of the party and whether the party is represented by counsel).

Even more remarkable is ES&G's contention a waiver did not occur when it failed to raise the issue at the time the K.A.T. Realty motion was filed. That motion, which was almost identical to the motion later brought by ES&G, provided all of the information upon which ES&G now bases its claim.

Although ES&G contends it can bring a motion to vacate at any time (Pet. at 10-11 n. 5), it is well understood a party must challenge a judge's ability to adjudicate a matter as soon as any alleged infirmity is known and prior to the judge's decision on a contested matter. *State v. Marhal,* 172 Wis. 2d 491, 505, 493 N.W. 2d 758 (Ct. App. 1992); *see also Taylor v. United States*, 179 F.2d 640, 642 (9th Cir. 1950). In *Taylor,* the court stated, "[a] defendant cannot take his chances with a judge and then, if he thinks that the sentence is too severe, secure a disqualification and a hearing before another judge." 179 F.2d at 642; *City of Cleveland,* 503 F. Supp. at 378-79 (purpose of requirement is to "prevent litigants from abusing motions to disqualify as dilatory tactics or as a means to 'sample the temper of the court' before deciding whether

to raise the issue of disqualification") (*see also,* cases cited therein). This is precisely what ES&G would like to do here.

As a result of Justice Geske's disclosure at oral argument, ES&G was well aware of the facts it claims supported this alleged conflict. It did not allege a conflict. After the decision was filed, ES&G filed for a motion for reconsideration. Again it did not allege a conflict. Even when three proposed *amici* raised an almost identical motion, ES&G failed to allege a conflict. It was not until the motion for reconsideration was denied that ES&G decided to challenge Justice Geske's ability to hear this case. The real motivation underlying this motion has nothing to do with Justice Geske's fairness or impartiality; it is simply to change the Wisconsin Supreme Court's decision. Sadly, this motion is nothing more than another litigation tactic. There is no reason to grant certiorari.

CONCLUSION

Based upon the foregoing, the petition for writ of certiorari should be denied.

Respectfully submitted,

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